Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

YAHYA LAVI,
Petitioner,

vs.

WILLIAM DUNCAN, Warden
California Men's Colony,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED FOR REVIEW

Whether, in a federal habeas corpus action filed by a State prisoner, the Suspension Clause is violated by dismissal on the basis of the one-year statute of limitations, 28 USC §2244(d)(1), when the petitioner has diligently pursued his state and federal remedies but has never been afforded a hearing by any court and both the District Court and Court of Appeals have denied certificates of appealability.

Parties to the Proceeding

All parties are listed in the caption of the case.

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STATEMENT OF JURISDICTION

Certiorari is sought to review the Order entered November 2, 1999,by the United States Court of Appeals for the Ninth Circuit which denies Petitioner's request for a certificate of appealability pursuant to 28 USC §2253(c). Rehearing was not sought.

Under 28 USC §1254(1), this Court has certiorari jurisdiction to review the denial of a certificate of appealability by a United States Court of Appeals. See, *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

This petition calls into question the constitutionality of the one-year statute of limitations set out in 28 USC §2254(d). Because 28 USC §2403(a) may apply, and pursuant to Supreme Court Rule 29.4(b), a copy of this petition has been served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001. The United States Court of Appeal did not certify to the Attorney General of the State of California that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, §9, Clause 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

28 USC §2244(d)(1):

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

Petitioner, YAHYA LAVI, a physician, is serving a sentence of 13 years in the California correctional system following his conviction of multiple sexual offenses against female patients.

On July 22, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in the Central District of California, which raised three fully exhausted constitutional claims.

1. Violation of the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process of law through limitation of cross-examination at trial.

2. Violation of the Fourteenth Amendment right to due process of law by the admission of evidence at trial of inflammatory and irrelevant evidence concerning Petitioner's character and prior bad acts which rendered the proceeding fundamentally unfair.

3. Cumulative prejudice from Claims 1 and 2 which rendered the proceedings fundamentally unfair, denying due process.

On September 18, 1997, Lavi amended his petition to add an additional claim of ineffective assistance of counsel which had been exhausted in the California Supreme Court on September 8, 1997. The amended petition expanded the claim of cumulative error to cumulate the prejudice from trial court errors and the ineffective assistance of counsel.

Upon motion of the Respondent, this first petition was dismissed without prejudice upon a finding that state remedies had not been exhausted with regard to the amended claim of cumulative prejudice. The district court reasoned that while each of the claims of trial court error and the claim of ineffective assistance of counsel were individually exhausted, the cumulative prejudice therefrom had not been specifically raised in the state court. In so doing, the district court rejected Lavi's argument that it would be futile to return to state court to argue cumulative prejudice from errors that the California courts had already determined had not occurred. This Order of March 6, 1998, specifically stated that the dismissal was "without prejudice to petitioner's right to file a new petition after he has exhausted state remedies."

Lavi returned to state court and exhausted the cumulative error claim. He then filed a second federal petition on October 9, 1998, which reiterated the three constitutional claims and cumulative error. Upon motion of the Respondent, the district court dismissed the petition with prejudice by Order entered April 8, 1999, on the ground that the second petition was not filed within the one-year statute of limitations, 28 USC §2244(d). The Court accepted the State's position that no tolling having occurred during the pendency of the first federal petition, the statute of limitations ran on December 4, 1997. It rejected Lavi's argument that the State was estopped from

reliance on the statute because it had silently acquiesced in the March 6, 1998, order which set out a right to return. Quite simply, the State had misled the petitioner and the Court by not indicating at that time that it was relying on the December 4, 1997, cutoff. Such an estoppel by acquiescence has been recognized in similar circumstances. See, *Burris v. Parke*, 95 F.3d 465 (7th Cir., *en banc* 1996).

Lavi sought to appeal this final order by requesting a certificate of appealability in the District Court. This was denied on May 24, 1999. His timely request to the Court of Appeals for a certificate of appealability was denied on November 2, 1999, although the Court did have jurisdiction to issue the certificate pursuant to 28 USC §§1291 and 2253(a).

At this point Lavi had done everything possible to bring his constitutional claims before the federal court, only to find himself mousetrapped by the Order of March 6, 1998, which had led him out of federal court while stating a right to return, a right which proved illusory. With the denials of the certificates of appealability, his claims have been denied solely on the basis of the statute of limitations and the merits have never been heard. Having exhausted all available procedures, he now relies on the Suspension Clause to supersede the statute of limitations because the remedy of habeas corpus has become inadequate and ineffective.

ARGUMENT

A statute of limitations for habeas corpus is a relatively new impediment to the Great Writ. 28 USC §2244(d) was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No.

104-132, 110 Stat. 1214. This Court has not yet determined the constitutionality of such a limitation under the Suspension Clause.

This Court has, however, said that the Suspension Clause is violated when an impediment renders the remedy of habeas corpus "inadequate and ineffective." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 1229-30, 51 L.Ed.2d 411 (1977). But it has also determined that not all impediments do so. For example, this Court has held that restrictions on filing successive petitions do not violate the Suspension Clause. *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996).

But *Felker v. Turpin* did not address impediments to a *first* federal habeas petition. Petitioner Lavi's situation fits that of a first filer as his "second" petition resulted directly from the district court's order instructing him to exhaust and return. Thus, the petitions are linked by the action of the Court and should be viewed singularly.

Of first petitions and the Suspension Clause, this Court has observed in *dicta* that,

> "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human delivery." *Lochnar v. Thomas*, 517 U.S. 314, 324, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1995) (emphasis in original).

Lochnar disapproved of the dismissal of a first federal habeas petition on equitable grounds other than those set

out in Rule 9 [Delayed or Successive Petitions] of the Rules Governing Section 2254 Cases.

The time has come to squarely hold that the one-year statute of limitations is an unconstitutional impediment to the Great Writ when applied to completely bar access to the federal courts. The statute is simply a ticking clock which, unlike Rule 9, does not take into consideration the matter of prejudice to the State. It is merely a statute of convenience for the states, and its purpose is to render the remedy of habeas corpus "inadequate and ineffective" for those who do not meet the 365-day limit regardless of the merits of their petitions.

As a consequence, the circuit courts have utilized the fiction of equitable estoppel to toll the statute in "extraordinary circumstances." See, *e.g.*, *Calderon v. United States (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert.denied*, 118 S.Ct. 899,1389 (1998). This is simply a judicial way of avoiding the Suspension Clause question in difficult cases. Likewise, an "actual innocence" exception to the statute of limitations has been created. See, discussion in *United States v. Zuno-Arce*, 25 F.Supp. 1097 (C.D. Ca. 1998).

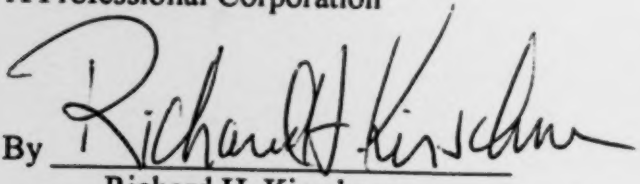
Although it may have been the intent of Congress to put all petitioners on an equal footing with the one-year limitation, current practice promotes disparity rather than uniformity. As evident from comparing the equitable position of petitioner Lavi to that of the petitioner in *Burris v. Parke, supra*, courts will view estoppels such as silent acquiescence differently. Further, the notion of "extraordinary circumstances" places an "extraordinary" burden on petitioners. They may lose their rights simply

because they do not know of them, *e.g.*, *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir.), *cert.denied*, 119 S.Ct. 210, 1442 L.Ed.2d 173 (1998), or lack the prison legal facilities to implement them, *United States v. Van Poyck*, 980 F.Supp. 1108, 1111 (C.D. Ca. 1997). Again, individual equities are weighed and uniformity is lost.

Petitioner therefore seeks a determination that the one-year statute of limitations on its face is an unconstitutional impediment which renders the writ of habeas corpus "inadequate and ineffective," *Felker v. Turpin, supra*, when applied to a first petition, *Lochnar v. Thomas, supra*, and a remand for determination whether or not his petition meets the requirements of Rule 9 of the Rules Governing Section 2254 Cases.

Respectfully submitted,

RICHARD H. KIRSCHNER,
A Professional Corporation

By 
Richard H. Kirschner

Attorney for Petitioner,
YAHYA LAVI.

FILED
November 2, 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YAHYA LAVI,	) No.99-55917
Petitioner-Appellant,	) DC#CV-98-08264-WJR-Mc-1
	) Central California
v.	) (Los Angeles)
WILLIAM DUNCAN, Warden, California Men's Colony	) ORDER
Respondent-Appellee.	)

Before: WALLACE and LEAVY, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. §§ 2253(c)(2), 2244(d).

ENTERED
Clerk, U.S. District Court
April 8, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) JUDGMENT
	)
v.	)
	)
WILLIAM DUNCAN, Warden, California Men's Colony,	)
	)
Respondents.	)

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The petition for writ of habeas corpus is dismissed as barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

DATED: 4-5-99

WILLIAM J. REA
United States District Judge

ENTERED
Clerk, U.S. District Court
April 8, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) ORDER ADOPTING REPORT
	) AND RECOMMENDATION
vi.	) OF UNITED STATES
	) MAGISTRATE JUDGE.
WILLIAM	)
DUNCAN, Warden,	)
California Men's	)
Colony,	)
	)
Respondents.	)
	)

Pursuant to 28 U.S.C. § 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and accepts and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: 4-5-99

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
March 10, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) REPORT AND RECOMMENDA-
	) TION OF UNITED STATES
vii.	) MAGISTRATE JUDGE ON A
	) PETITION FOR WRIT OF
WILLIAM	) HABEAS CORPUS BY A
DUNCAN, Warden,	) PERSON IN STATE CUSTODY.
California Men's	)
Colony	)
	)
Respondents.	)
	)

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The petitioner is a state prisoner in the California Men's Colony at San Luis Obispo, California. Following a jury trial in the Los Angeles County Superior Court, the

petitioner was convicted of two counts of rape of an unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person and three counts of misdemeanor sexual battery. On June 6, 1994, the trial court sentenced the petitioner to a total term of 13 years in state prison.

On April 17, 1996, the petitioner's conviction was affirmed on appeal to the California Court of Appeal which modified the judgment by removing one day of presentence custody credit. The petitioner filed a petition for review in the California Supreme Court. On July 24, 1996, the California Supreme Court denied the petition for review.

On July 22, 1997, the petitioner filed his first petition for writ of habeas corpus in the California Court of Appeal. On July 24, 1997, the California Court of Appeal denied the petitioner's petition for writ of habeas corpus.

On July 29, 1997, the petitioner filed a second petition for review in the California Supreme Court challenging the denial of his first habeas petition in the California Court of Appeal. On September 8, 1997, the California Supreme Court denied the petitioner's second petition for review on the merits.

On July 22, 1997, the petitioner filed a petition for writ of habeas corpus in this court in Case No. CV 97-5368-WJR (Mc). On September 18, 1997, the petitioner filed his amended petition for writ of habeas corpus in cv 97-5368-WJR (Mc).

On March 6, 1998, the Clerk of the Court entered this court's judgment denying the amended petition without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies.

On June 8, 1998, the petitioner filed a second petition for writ of habeas corpus in the California Court of Appeal. On June 11, 1998, that court denied this second state habeas petition.

On July 10, 1998, the petitioner filed his third petition for review in the California Supreme Court, seeking review of the denial of his second state habeas petition, filed June 8, 1998, in the California Court of Appeal. On August 19, 1998, the California Supreme Court denied that third petition for review.

On October 9, 1998, the petitioner filed his present petition for writ of habeas corpus in this court. This is the petitioner's second habeas petition filed in this court. The petition makes the following claims:

Claim Number One

The trial court violated the petitioner's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law when it:

(a) did not permit the petitioner to cross-examine any of his accusers to show demands of $5 million on the accusers' civil suits against the petitioner;

(b) did not permit cross-examination of victim Lazara G. regarding:

(i) the falsity of a prior claim of sexual harassment; and

(ii) a false police report filed by Lazara G.

Claim Number Two

The trial court violated the petitioner's right to due process when it admitted inflammatory and irrelevant evidence concerning the petitioner's character and prior bad acts, resulting in a trial which was fundamentally unfair.

Claim Number Three

The petitioner received ineffective assistance of trial counsel when trial counsel failed to call Hector Rosales as a witness to show that victim Lazara G. had previously filed a false claim of sexual harassment.

Claim Number Four

The petitioner suffered cumulative prejudice as the result of the combined effects of Claim Numbers One, Two and Three, above, rendering the petitioner's trial fundamentally unfair and denying the petitioner his right to due process, guaranteed by the Fourteenth Amendment.

DISCUSSION

Statute of Limitations

The state respondent has now moved to dismiss the petition on the ground that the petition was untimely filed in violation of the one year statute of limitations. The petitioner has filed an opposition to the motion to dismiss.

The pertinent statute of limitations provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been

discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The primary date used to determine the day from which the one year statute of limitation begins to run is the date the judgment of conviction became final or the expiration of the time for seeking appellate review. 28 U.S.C. § 2244(d)(1)(A). In the present case, the California Supreme Court denied the petitioner's first petition for review on July 24, 1996. The petitioner has not alleged that he sought further direct review on certiorari to the United States Supreme Court. In any event, the time for seeking such review expired 90 days after the California Supreme Court denied the petition for review or on October 22, 1996. Rule 13(1), Rules of the Supreme Court of the United States; 28 U.S.C. §2101(d). The one year statute of limitations ordinarily would begin to run on October 22, 1996 and expire on October 21, 1997.

The one year statute of limitations first came into effect with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on April 24, 1996. Previous case law in this circuit has established that no petition filed on or before April 23, 1997, one year after the enactment of the AEDPA, may be dismissed for failure to

comply with the one year time limit. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. Denied, 118 S.Ct. 899 and 118 S.Ct. 1389 (1998).

Absent the application of tolling periods, the last date for the filing of the petition in this case was the date which is later when comparing one year after the petitioner's state judgment became final, which was October 21, 1997, to one year after the date of enactment of AEDPA, which was April 23, 1997. In this case, the later date is October 21, 1997.

There is no basis in the present record for seeking to fix the date for beginning the running of the one year statute by any statutory criteria other than that set forth in 28 U.S.C. § 2244(d)(1)(A) according to the discussion set forth above. Thus, there is no evidence in the present record of an impediment to filing a habeas petition created by state action. 28 U.S.C. § 2244(d)(1)(C). The factual predicates for the claims presented in this court were known to the petitioner at least by the time of the filing of his first state habeas petition in the California Court of Appeal on July 22, 1996. Thus, the provisions of 28 U.S.C. § 2244(d)(1)(D) are inapplicable.

The petitioner is entitled to toll the statute of limitations for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." 28 U.S.C. § 2244(d)(2). Thus, the petitioner is entitled to toll the statute during the following periods after October 22, 1996:

(1) the time during which the petitioner's first petition for writ of habeas corpus was

pending in the California Court of Appeal. The petition was filed on July 22, 1997 and dismissed on July 24, 1997. The statute of limitations was tolled for two days; and

(2) the time during which the petitioner's second petition for review was pending in the California Supreme Court. The petition was filed July 29, 1997 and denied September 8, 1997. The statute of limitations was tolled for 41 days.

The petitioner is thus entitled to toll the statute for a total of 43 days (2 days plus 41 days). The statute of limitations thus expired 43 days after October 31, 1997 or on December 3, 1997. Any new petition filed on or after December 4, 1997 is barred by the one year statute of limitations of 28 U.S.C. § 2244(d)(1). The present petition was filed on October 9, 1998 and is barred by the statute of limitations.

No Tolling For Previous Federal Habeas Petitions Dismissed Without Prejudice

The court should not toll the statute of limitations for periods of time in which the petitioner's unexhausted habeas petition in Case No. CV 97-5368-WJR (Mc) was pending in this court. The statute allows the period of limitations to be tolled only for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." 28 U.S.C. § 2244(d)(2) (emphasis added). The drafters of the statute specifically included within the tolling statute the time in which an application for state post-conviction remedies is pending and failed to include the time in which an

application for federal post-conviction remedies is pending. 'That drafting choice appears to be a deliberate congressional determination which this court should honor.

The Ninth Circuit Court of Appeals has not yet decided whether an application for federal post-conviction remedies tolls the one year statute of limitations of 28 U.S.C. § 2244(d)(1). Available case law strongly supports the conclusion that the statute is not tolled in this situation. Babcock v. Duncan, 1997 WL 724450, *2 (N.D. Cal. 1997) (no court has found that the statute is tolled for the period in which a properly filed application for post-conviction or other collateral review is pending in federal court).

As a general proposition, federal law does not provide for the tolling of a statute of limitations during a period of time in which a first action was pending, in circumstances in which the first action is dismissed, without prejudice, (whether voluntarily or involuntarily) and the claims asserted in the initial action are later raised in a second action. Humphreys v. United States, 272 F.2d 411, 412 n.1 (9th Cir. 1959) ("In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him. . . ."); Ford v. Sharp, 758 F.2d 1018, 1024 (5th Cir. 1985) (no tolling of statute of limitations for time elapsed during pendency of original suit voluntarily dismissed by plaintiff without prejudice); Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531 (1896) ("[I]f a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause . . . the action . . . is dismissed, and, during the pendency of the action, the limitation runs, the remedy is

barred."); Parker v. Marcott, 975 F.Supp. 1266, 1269 (C.D. Cal. 1997), quoting McClendon v. North American Rockwell Corp., 1970 WL 106, *6 (C.D. Cal. 1970) ("Absent a savings statute which specifically permits a plaintiff to refile an action after a dismissal not on the merits, the law is clear that a dismissal without prejudice leaves the situation the same as if the suit had never been brought.").

The court should not toll the statute of limitations for any time after April 24, 1996 in which the petitioner had a previous habeas petition pending in this court. The statute of limitations in this case expired on December 4, 1997. The present habeas petition was lodged in this court on October 9, 1998. The present petition is barred by the statute of limitations.

In any event, tolling the statute of limitations for the period in which the first federal habeas petition was pending in this court would not assist the petitioner. The petitioner's first federal habeas petition was filed in this court on July 22, 1997 and denied on March 6, 1998. The first petition was pending in this court for 227 days. Assuming arguendo that the statute was tolled during this period, the statute was tolled for 227 days after October 21, 1997 or to June 5, 1998, when it expired. The petitioner filed his present petition on October 9, 1998, well after June 5, 1998.

The petitioner contends in his opposition that the court should consider the petitioner's two separate federal habeas petitions in this court as "a unitary process once federal jurisdiction has been invoked." (Petitioner's Opposition, filed February 8,1999, p. 4.) Under this concept, a second otherwise untimely filed federal habeas

petition, which was filed after the dismissal of a first timely filed federal habeas petition for failure to exhaust state remedies, would be considered to be timely filed, because the second petition is part of the "unitary process" initiated by the first timely filed petition. ; As support for this proposition, the petitioner cites two cases. Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 1621, 140 L.Ed.2d 849 (1998) held that a prisoner sentenced to death was not barred by the "second or successive habeas corpus application" language of 28 U.S.C. § 2244(b)(2) from reviving a claim that he could not be executed while insane, in circumstances in which the petitioner had initially made the insanity claim in a federal habeas petition but the district court had declined to rule on the claim as premature. In re Turner, 101 F.3d 1323 (9th Cir. 1997) holds that "the second or successive application" language of 28 U.S.C. § 2244(b)(3)(A) does not require a court of appeal to decline to permit the filing of a second petition filed after a district court dismissed an initial petition for failure to exhaust state remedies. Both of the cases cited by the petitioner are interpretations of the "second or successive" application language of various provisions of 28 U.S.C. § 2244(b). Neither of the cited cases may be fairly construed to apply to the statute of limitations of 28 U.S.C. § 2244(d). Thus, the petitioner has not cited any applicable law which supports his "unitary process" theory.

On the present facts and the applicable law, the petition is barred by the statute of limitations.

RECOMMENDATION

For the reasons stated above, the magistrate judge recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2)

dismissing the petition as barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

Dated: March 10, 1999

JAMES W. McMAHON
United States Magistrate Judge

ENTERED
Clerk, U.S. District Court
March 6, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) JUDGMENT
	)
v.	)
	)
WILLIAM DUNCAN, Warden, et al.,	)
	)
Respondents.	)

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The amended petition for writ of habeas corpus is denied without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein.

DATED: 3-4-98

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
March 4, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) ORDER ADOPTING REPORT
	) AND RECOMMENDATION
vi.	) OF UNITED STATES
	) MAGISTRATE JUDGE.
WILLIAM	)
DUNCAN,	)
Warden, et al.,	)
	)
Respondents.	)
	)

Pursuant to 28 U.S.C. § 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and approves and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: 3-4-98

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
February 9, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) REPORT AND RECOMMENDA-
	) TION OF UNITED STATES
vii.	) MAGISTRATE JUDGE ON A
	) PETITION FOR WRIT OF
WILLIAM	) HABEAS CORPUS BY A
DUNCAN,	) PERSON IN STATE CUSTODY.
Warden, et al.,	)
	)
Respondents.	)
	)

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The petitioner is a state prisoner in the California Men's Colony at San Luis Obispo, California. Following a jury trial in the Los Angeles County Superior Court, the petitioner was convicted of two counts of rape of an

unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person and three counts of misdemeanor sexual battery. On June 6, 1994, the trial court sentenced the petitioner to a total term of 13 years in state prison.

On April 17, 1996, the petitioner's conviction was affirmed on appeal to the California Court of Appeal which modified the judgment by removing one day of presentence custody credit. The petitioner filed a petition for review in the California Supreme Court. On July 24, 1996, the California Supreme Court denied the petition for review.

The petitioner then filed a petition for writ of habeas corpus in the California Court of Appeal. On July 24, 1997, the California Court of Appeal denied the petitioner's petition for writ of habeas corpus.

Thereafter, the petitioner filed a second petition for review in the California Supreme Court. On September 8, 1997, the California Supreme Court denied the petitioner's second petition for review on the merits.

On September 18, 1997, the petitioner filed his amended petition for writ of habeas corpus in this court. The petitioner claims the following:

Claim Number One

The trial court violated the petitioner's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law when it:

(a) did not permit the petitioner to cross-examine any of his accusers to show demands of $5 million on the accusers' civil suits against the petitioner;

(b) did not permit cross-examination of victim Lazara G. regarding:

(i) the falsity of a prior claim of sexual harassment; and

(ii) a false police report filed by Lazara G.

Claim Number Two

The trial court violated the petitioner's right to due process when it admitted inflammatory and irrelevant evidence concerning the petitioner's character and prior bad acts, resulting in a trial which was fundamentally unfair.

Claim Number Three

The petitioner received ineffective assistance of trial counsel when trial counsel failed to call Hector Rosales as a witness to show that victim Lazara G. had previously filed a false claim of sexual harassment.

Claim Number Four

The petitioner suffered cumulative prejudice as the result of the combined effects of Claim Numbers One, Two and Three, above, rendering the petitioner's trial

fundamentally unfair and denying the petitioner his right to due process, guaranteed by the Fourteenth Amendment.

DISCUSSION

A petition for writ of habeas corpus by a person in state custody may not be granted unless all available state court remedies have been fully exhausted. 28 U.S.C. § 2254(b), (c); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). If a petition contains both exhausted and unexhausted claims, the entire petition is subject to dismissal. Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988).

State remedies have not been exhausted unless and until the merits of the petitioner's federal claim have been fairly presented to the state's highest court. Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995); Castille v. Peoples, 489 U.S. 346, 350-351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) (citing Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 508, 512, 30 L.Ed.2d 438 (1971)); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). A claim is fairly presented to the state's highest court if the petitioner raises "the operative facts and legal theory" on which his claim is based. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986); see also Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct.276, 74 L.Ed.2d 3 (1982). In fairly presenting a federal claim, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, [citation omitted], or that a somewhat similar state law claim was made." Anderson v. Harless, 459 U.S. at 6 (citing Picard v. Connor, 404 U.S. at 276-77).

The petitioner here filed two applications for post-conviction relief in the California Supreme Court: a petition for review, filed March 24, 1996 ("the first petition for review") and a petition for review, filed July 29, 1997 ("the second petition for review"). The first petition for review squarely raised Claim Numbers One and Two, above, did not raise Claim Number Three, above, and made an argument that the cumulative impact of many claimed deficiencies asserted in that petition rendered the petitioner's trial fundamentally unfair. (Answer, Exhibit "C", p. C-48). The second petition for review raised only Claim Number Three, above, and did not raise a claim of multiple errors resulting in a cumulative impact. (Answer, Exhibit F, pp. F79-115.)

Claim Number Four of the amended petition now before this court contains a claim of multiple errors in Claim Numbers One, Two and Three, above, resulting in a cumulative impact which rendered the petitioner's trial fundamentally unfair. The petitioner has never presented this exact cumulative impact claim to the California Supreme Court. The only cumulative impact claim which the petitioner has previously presented to the California Supreme Court included only Claim Numbers One and Two, above, and did not include Claim Number Three, above.

To satisfy the exhaustion requirement, the petitioner must fairly present the substance of his claim to the California Supreme Court. Picard v. Connor, 404 U.S. at 275. The petitioner here never presented his current cumulative impact claim to the California Supreme Court. ; He presented a different cumulative impact claim qhich included only two of the three claims included in his current claim. To satisfy the requirement of exhaustion of

state remedies, a state prisoner must present the state court with the same claim he urges on the federal court. Picard v. Connor, 404 U.S. at 276. The petitioner here presented a different claim in the state court.

The petitioner has not exhausted state remedies in the California Supreme Court as to Claim Number Four, above, the cumulative impact claim. The amended petition thus constitutes a "mixed petition" of exhausted and unexhausted claims and must be dismissed. Rose v. Lundy, 455 U.S. at 522. The court should deny the amended petition, without prejudice, for failure to exhaust state court remedies.

RECOMMENDATION

The Magistrate Judge therefore recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the amended petition without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein.

Dated: February 9, 1998

JAMES W. McMAHON
United States Magistrate Judge

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – APPEALS

Case No. CV-98-8264-WJR (Mc)

U.S.C.C.A. Case No. 99-55917 Date: 11-18-99

Title: Yahya Lavi v. William Duncan

PRESENT: THE HON.: WILLIAM J. REA, JUDGE

M. Dillard	Not Reported
Deputy Clerk	Court Reporter

Attorneys for Plaintiff	Attorneys for Defendant
1) Richard H. Kirschner	1) Michael C. Keller, DAG
2)	2)
3)	3)

PROCEEDINGS: Filing and Spreading Mandate of the Ninth Circuit Court of Appeals

__ In Court _x_ In Chambers (No hearing necessary) _x_ Counsel Notified By mail

THE COURT ORDERS that the mandate of the Ninth Circuit of Appeals:

__ Affirming __ Remanding __ Reversing & Remanding
__ Affirming in part, reversing in part __ Dismissing Appeal
__ The record reflects that costs of the prevailing party were taxed by Ninth Circuit Court of Appeals in the amount of $ _____ on _____.

__x__ Other: Request for Certificate of Appealability is denied.

is hereby filed and spread upon the minutes of this U.S. District Court.

(ENTERED 11/22/99) ___ MAKE JS-5

Initials of Deputy Clerk

CIVIL MINUTES – APPEALS

RICHARD H. KIRSCHNER
A Professional Corporation
Fourth Floor AVCO Center
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California Bar No. 43471

Attorney for Petitioner.

FILED
99 APR 29
Clerk, U.S. District Court
Central District of California
Los Angeles

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	No.CV 98-8264-WJR(Mc)
Petitioner,	PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY; POINTS AND AUTHORITIES; [PROPOSED] ORDER.
v.	
WILLIAM DUNCAN, Warden, California Men's Colony	
Respondent.	

Petitioner Yahya Lavi, pursuant to 28 USC 2253(c)(2) and FRAP 22(b), requests the Court to issue a Certificate of Appealability granting leave to appeal from the final order entered on April 8, 1999, which adopts the

Report and Recommendation of the United States Magistrate Judge dismissing with prejudice the Petition for Writ of Habeas Corpus filed herein for failure to comply with the one-year statute of limitations of 28 U.S.C. 2244(d).

The grounds for this request are set out with particularity in the Points and Authorities which follow. A Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been filed simultaneously herewith.

PROCEDURAL HISTORY

Petitioner is confined at the California Men's Colony at San Luis Obispo under a sentence of thirteen years following his conviction of two counts of rape of an unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person, and three counts of misdemeanor sexual battery.

On July 22, 1997, petitioner filed a Petition for Writ of Habeas Corpus in this Court, CV 97-5368-WJR (Mc), which raised three fully exhausted constitutional claims:

1) Violation of the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process of law through restriction of cross-examination at trial.

2) Violation of the Fourteenth Amendment right to due process of law by the admission of inflammatory and irrelevant trial evidence concerning petitioner's character and prior bad acts which rendered the

proceeding fundamentally unfair.

3) Cumulative prejudice from Claims 1 and 2 which rendered the proceeding fundamentally unfair, denying due process.

On September 18, 1997, petitioner amended the petition to add an additional claim for ineffective assistance of counsel which was exhausted in the California Supreme Court on September 8, 1997. The amended petition also expanded the previous claim of cumulative error to include ineffective assistance of counsel.

Upon motion of Respondent, the amended petition filed September 18, 1997, was dismissed without prejudice by Order entered March 6, 1998, due to the failure to exhaust state remedies with regard to the claim of cumulative prejudice, as it related to the ineffective assistance of counsel claim. The Court reasoned that while each of the claims of trial court error and the claim of ineffective assistance were separately exhausted, the cumulative prejudice therefrom had not been specifically raised in the state court. In so doing, the Court rejected petitioner's argument that it would be futile to return to state court to argue cumulative prejudice from errors when the California courts had already determined that no errors had occurred.

Petitioner then returned to state court and exhausted the cumulative error claim, and petitioner filed the instant petition on October 9, 1998, which again raised the four constitutional claims which had been dismissed on March 6, 1998. Upon motion of Respondent, this Court dismissed the petition by Order entered April 8, 1999, on the ground that the second petition was not filed within the one-year

statute of limitation set out in 28 USC 2244(d). Petitioner seeks to appeal this final order.

MEMORANDUM OF POINTS AND AUTHORITIES

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) changed appellate procedure for habeas corpus cases by replacing Certificates of Probable Cause with Certificates of Appealability (COA).

> 28 U.S.C. 2253 now states, in pertinent part:
> (c)(1) Unless a circuit judge or district judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from---
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rule of Appellate Procedure 22 states:

(b) Certificate of Appealability.

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. 2255 proceeding, the applicant cannot take an appeal unless a circuit judge or district judge issues a certificate of appealability under 28 U.S.C. 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue an certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district court judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

While 28 U.S.C. 2253(c) speaks only of COAs for constitutional issues, a COA is also required when the petition has been dismissed on procedural grounds. See, Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997) [appeal from dismissal for failure to exhaust state remedies]. A two-step COA process is utilized when the dismissal is on procedural, nonconstitutional grounds. Robinson v. Johnson, 151 F.3d 256, 263 (5th Cir. 1998).

This two-step process applies to dismissal under the AEDPA statute of limitation. Sonnier v. Johnson, 161 F.3d 941, 943 (5th Cir. 1998); Davis v. Johnson, 158 F.3d 806, 809 (5th Cir. 1998). First, the court determines whether the petitioner "has made a credible showing that his claim

should not have been dismissed as time-barred." Davis, 158 F.3d at 809. If that showing is made, the court then determines "whether the prisoner has made a substantial showing of the denial of a constitutional right on the underlying claims." Sonnier, 161 F.3d at 944.

Any doubt about entitlement to a COA should be resolved in favor of granting it. See, Sonnier, 161 F.3d at 944; Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir.), *cert. denied*, 118 S.Ct. 399 (1997).

I

PETITIONER CAN MAKE A CREDIBLE SHOWING THAT HIS PETITION IS NOT TIME-BARRED.

Petitioner is in a unique circumstance. He timely[1] filed four constitutional claims. At the insistence of Respondent he was forced to return to state court to exhaust one claim only -- the claim of cumulative prejudice as it related to the ineffective assistance of counsel claim. He reasonably believed that his right to return to this Court was secure because the dismissal was "without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein." Respondent raised no objection to this language. Now, at Respondent's insistence, Petitioner's return to federal court has been deemed time-barred.

---

[1]The first petition was filed on July 22, 1997 and amended September 18, 1997. This Court has determined that the one-year statute of limitation ran on December 4, 1997.

All of this arises from the debatable determination by this Court that the first petition contained an unexhausted claim, *viz.*, that of cumulative prejudice premised on the ineffective assistance of counsel claim. Petitioner continues to maintain that the Court was plainly wrong because each of Petitioner's substantive claims had been presented to the California courts which found no error. Therefore there was no error to "cumulate."

Cumulative prejudice arises from the quantitative effect of multiple harmless errors which render a trial fundamentally unfair. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Lundy v. Campbell, 888 F.2d 467, 472-73 (6th Cir. 1989), cert. denied, 110 S.Ct. 2212 (1990). But in Petitioner's case the California courts did not find harmless error. The state courts found no error. A petitioner is not required to exhaust that which has already been determined or make a clearly futile return to the state court. See 28 U.S.C. 2254 (b)(1)(B); Rupe v. Wood, 93 F.2d 1434, 1440 (9th Cir. 1996).

This issue alone should justify a Certificate of Appealability. Respondent may argue that the dismissal for lack of exhaustion should have been appealed at that time. But this is the first reasonable opportunity to bring the issue to the appellate court. Respondent raised the exhaustion issue in November 1997. The statute of limitations ran on December 4, 1997, because, as this Court has ruled, the federal habeas pendency did not toll the one-year statute. If this Court had promptly ruled, petitioner could have returned to state court prior to December 4, 1997. If petitioner had appealed the exhaustion ruling to the Ninth Circuit, and the ruling was affirmed, petitioner would then have been time-barred from refiling because the federal filing did not toll the statute of limitations. If petitioner had

attempted to simultaneously exhaust the cumulative prejudice claim in the state court while appealing to the Ninth Circuit, the pendency of the state action would have mooted the federal appeal. In short, petitioner had no reasonable opportunity prior to now to appeal.

Petitioner took the reasonable course and relied on this Court's dismissal without prejudice as granting him the right to return. At that time (March 6, 1998), he did not know that Respondent would later contend that the statute of limitation had run on December 4, 1997. Respondent silently acquiesced in the March 6, 1998, dismissal "without prejudice to petitioner's right to file a new petition after he has exhausted state remedies."

The one-year AEDPA statute of limitations is not a jurisdictional bar and is subject to equitable tolling and estoppel. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 899 and 1389 (1998); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998). Such an estoppel can be found when the state silently acquiesces in the court's ruling permitting return after exhaustion. Burris v. Parke, 95 F.3d 465 (7th Cir. *en banc* 1996). That is the precise circumstance here.

As petitioner can make a credible showing that his petition is not time-barred, a Certificate of Appealability should issue.

II

PETITIONER CAN MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AS TO EACH OF HIS

FOUR CLAIMS.

Claim One:

Petitioner claims that the trial court improperly restricted cross-examination of the alleged sexual assault victims in violation of the Sixth and Fourteenth Amendments. Four of Petitioner's five accusers were each civilly suing him for $5 million in damages. The trial court refused to permit cross-examination as to the amount of money these women were seeking. Petitioner was also not permitted to cross-examine witness Lazara G. regarding a prior false claim of sexual harassment and police report filed by her. The Sixth and Fourteenth Amendments require full exploration on cross-examination of issues of credibility and bias. See, United States v. Abel, 105 S.Ct. 465 (1984); Davis v. Alaska, 94 S.Ct. 1105 (1974).

Claim Two:

Petitioner claims denial of due process of law by the introduction of inflammatory and irrelevant evidence of bad character and prior bad acts which rendered the trial fundamentally unfair. Specifically, the prosecution was allowed to bring out Petitioner's gross income ($460,000 in 1989); that he had referred to his accusers as "dirty and smelly;" and that he had practiced medicine without a license, misrepresented his training, and dispensed controlled substances without a license. Due process requires adherence to rules of evidence consistent with proof beyond a reasonable doubt and relevance. See, Brinegar v. United States, 69 S.Ct. 1302, 1310 (1949); McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 622 (1993).

Claim Three:

Petitioner claims ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments. Counsel was in possession of an investigative interview with Hector Rosales, former job supervisor of victim Lazara G. This report detailed that Lazara G. had made false claims of sexual harassment against Rosales. Counsel failed to call Rosales as a witness. This omission in the context of all the surrounding circumstances was outside the range of professional competence and, but for such incompetence, there is a reasonable probability that the result would have been different. See, Strickland v. Washington, 104 S.Ct. 2052 (1984).

Claim Four:

Petitioner claims that the cumulative prejudice from the above constitutional errors rendered the trial fundamentally unfair and denied him due process of law. See Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

CONCLUSION

For the foregoing reasons, a Certificate of Appealability should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD H. KIRSCHNER,
A Professional Corporation

By s/ Richard H. Kirschner
Richard H. Kirschner

Attorney for Petitioner,
YAHYA LAVI.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10850 Wilshire Boulevard, Los Angeles, CA.

On April 28, 1999, I served the foregoing document described as PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY; POINTS AND AUTHORITIES; [PROPOSED] ORDER on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

OFFICE OF THE ATTORNEY GENERAL
300 S. Spring Street
Los Angeles, CA. 90013

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 28, 1999, at Los Angeles, California.

s/ Judith Pierce
JUDITH PIERCE